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4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 FELIPE G. VARGAS,

7
8 Plaintiff,

9 vs.

10 THOMAS EARL & GRANT COUNTY,

11 Defendants.
12

No. CV-06-146-JLQ

ORDER ON MOTIONS HEARD
ON NOVEMBER 25, 2008

13 Innumerable motions were heard by the court on November 25, 2008. George
14 Ahrend and Garth Dano appeared for the Plaintiff. Nicholas Jenkins and Garth Dano
15 represented Grant Count. The Defendant Thomas Earl, et ux, appeared by Mr. Earl *pro*
16 *se*. The parties are familiar with the procedural history and factual background which is
17 referenced in this court's November 26, 2008 Order Denying Grant County's Motion For
18 Summary Judgment Re: Attorney Malpractice Claim (C.R. 265). All Motions To
19 Expedite Hearing are **GRANTED**. (C.R. 205,227,255).

20 **POLYGRAPH ISSUES**

21 There is a virtual plethora of motions and pleadings that have been filed
22 concerning the admissibility of the polygraph tests of Mr. Vargas and the testimony of
23 witnesses concerning the results and reliability of polygraph tests in general and those of
24 Mr. Vargas in particular. *Inter alia*, there are disputes as to whether the testing of Mr.
25 Vargas was done pursuant to an agreement between Grant County Deputy Prosecutor
26 Fair, whether the report of Dr. Barland concerning the polygraph reliability was timely
27 disclosed and whether Dr. Barland should be allowed to testify at trial. All motions to

1 expedite hearing on the polygraph motions are **GRANTED** and any unresolved motions
2 in connection with the polygraph issues shall be heard, along with the pending *Daubert*
3 motions, commencing on Friday the 12th day of December, 2008 at 9:30 a.m. Grant
4 County shall serve and file their polygraph expert witness report(s) on or before
5 December 5, 2008.

6 Clerk's Record 165-Plaintiff's Motion Re: Stipulated Polygraph. The Plaintiff
7 seeks a pre-trial ruling on the admissibility of of the King polygraph examination of Mr.
8 Vargas based upon the alleged stipulation of Deputy Prosecutor Fair in the criminal
9 proceedings against Mr. Vargas. Issues of fact exist concerning whether agreement was
10 reached and for that reason the Motion based upon the alleged stipulation is **DENIED**.
11 This ruling does not prohibit the Plaintiff from offering in evidence the results of the
12 King polygraph examination as independent evidence of the Plaintiff's actual innocence
13 if the court's December 12, 2008 *Daubert* ruling so allows.

14 Clerk's Record 226-Defendant's Motion To Strike and Exclude Polygraph
15 Disclosure. The Defendant Grant County seeks to strike the submittal of the Plaintiff
16 containing Dr. Barland's declaration. That Motion is **DENIED**, provided however, that
17 in view of Dr. Barland's belated disclosure, Dr. Barland may not testify in Plaintiff's case
18 in chief, but may testify in rebuttal if the Defendant(s) offer testimony as to the lack of
19 reliability of polygraph tests in general or that of Mr. Vargas in particular.

20 Clerk's Record 252-Grant County's Motion To Strike Plaintiff's Motion For
21 *Daubert* Hearing is **DENIED** in view of the court's scheduling of the hearing for
22 December 12, 2008.

23 **MOTION TO STRIKE**

24 Grant County has filed a Motion To Strike Declarations of Schiffner, Haas, and
25 Lindholdt (C.R. 203). That Motion is **GRANTED** as being unopposed by the Plaintiff.
26 Mr. Schiffner was disclosed on Plaintiff's List of Witnesses as testifying to the
27 performance of Mr. Earl under his contract with Grant County. Mr. Schiffner's testimony

1 will be limited to that matter.

2 **BRADY ISSUES**

3 Finally, the court heard Defendant Grant County's Motion for Summary Judgment
4 Re: *Brady* Claim (C. R. 160), to which the Plaintiff responded in opposition (Ct. Rec.
5 220) and Defendant Grant County replied (C. R. 235). The motion is **DENIED**. The
6 Defendants argue that the language of cases such as *Becker v. Kroll*, 494 F.3d 904, 924
7 (10th Cir. 2007) and *Taylor v. Waters*, 81 F.3d 429, 436 (4th Cir. 1996) create a simple
8 and absolute bar against Mr. Vargas' civil rights claims. Grant County claims that since
9 the charges in the case were dismissed with prejudice, Mr. Vargas cannot show that he
10 was deprived of a constitutional right. Both of the cited cases involved § 1983 *Brady*
11 claims by plaintiffs whose cases did not go to trial, but it should be noted that in neither
12 case did the plaintiffs present evidence of pretrial incarceration or other burdens on their
13 liberty equivalent to that experienced by Mr. Vargas. Grant County argues that a person
14 who spent seven months in jail has no legitimate civil rights claim if the charges against
15 him are later dismissed, regardless of the conduct or inaction of the attorney assigned by
16 the County. The court does not agree. Such an interpretation would give *carte blanche*
17 immunity to the conduct of attorneys and prosecutors during the pretrial phase of
18 proceedings where the charges are later dismissed and the Plaintiff has been incarcerated
19 for seven months. See this court's Order Denying Grant County's Motion for Summary
20 Judgment Re: Attorney Malpractice Claim (C. R. 265) for further discussion.

21 Grant County argues that all exculpatory information was actually disclosed by the
22 Prosecutor (C. R. 161, 7-9), but this argument improperly responds to Mr. Vargas'
23 Amended Complaint. Mr. Vargas' claim is not against the Grant County Prosecutor nor
24 any individual law enforcement official, it is against Grant County as a municipality. (C.
25 R. 121). A municipality is liable under § 1983 if the municipality itself, through the
26 implementation of a municipal policy or custom, causes a constitutional violation. *Monell*
27 *v. New York City Dep't of Social Services*, 436 U.S. 658, 691-95,(1978). In order to prove

1 municipal liability, a plaintiff must establish “that, through its deliberate conduct, the
2 municipality was the ‘moving force’ behind the [constitutional] injury alleged.” *Board*
3 *of County Commissioners of Bryan County v. Brown*, 117 S.Ct. 1382, 1388 (1997).
4 Municipal liability on a § 1983 claim may not be premised on a *respondeat superior*
5 theory, *Monell*, 436 at 693-94, but the failure of a municipality to train or supervise
6 employees is actionable. *Walker v. City of New York*, 974 F.2d 293, 297-98 (2nd Cir.
7 1992).

8 The Amended Complaint alleges that Mr. Vargas' constitutional right of due
9 process was violated by Grant County through their lack of training or supervision of
10 prosecutorial staff and law enforcement personnel regarding their obligations under
11 *Brady*. Whether or not such lack of training or supervision rises to the level of a violation
12 of Mr. Vargas' constitutional right of due process represents a genuine issue of material
13 fact. *Miranda v. Clark County*, 319 F. 3d 465, 469 (9th Cir. 2003); *Goldstein v. City of*
14 *Long Beach*. 481 F. 3d 1170 (9th Cir. 2007).

15 ACTUAL INNOCENCE

16 The court heard argument on Plaintiff Motion For Partial Summary Judgment re:
17 Actual Innocence (C.R. 157) in which Plaintiff relied upon the Amended Information
18 with typographical errors without the birthdate of Yesenia. The court stated that it was
19 its impression that it was the original Information that caused the arrest and incarceration
20 of Mr. Vargas while represented by Mr. Earl and that such would appear to be the charges
21 that would govern the proof of innocence issue. *See Ang v. Martin*, 154 Wash. 2d 477,
22 484-85 (2005). Ruling on this Motion is **RESERVED**. The court will hear further
23 argument on that matter on December 12, 2008.

24 In addition to the foregoing matters and in view of the large number of objections
25 to exhibits and *motions in limine*, the court will also hear from counsel on December 12,
26 2008 on all exhibit objections and on such additional matters on which briefing has been
27 completed. If hearing on such at issue motions and objections is not completed on

1 December 12, 2008. such unresolved matters will be heard at the pretrial conference in
2 Spokane on January 16, 2009.

3 The Clerk of this court shall enter this Order and forward copies to counsel and to
4 Mr. Earl.

5 **DATED** this 4th day of December 2008

6 s/ Justin L. Quackenbush
7 JUSTIN L. QUACKENBUSH
8 SENIOR UNITED STATES DISTRICT JUDGE
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